

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MERRICK JOSE MOORE,

Plaintiff,

No. CIV S-04-0763 GEB KJM P

vs.

S. SALENGER, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prison inmate proceeding pro se with a civil rights action under 42 U.S.C. § 1983. Defendant Sloss (defendant), an employee of the California Department of Corrections and Rehabilitation (CDCR), has filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). In the alternative defendant asks that this matter be stayed until the conclusion of CIV-S-04-0871 MCE EFB P.

In his complaint, plaintiff asserts that defendant retaliated against plaintiff because plaintiff filed a prisoner grievance against defendant. Plaintiff asserts the retaliation resulted in plaintiff being denied access to courts, subjected to excessive force imposed by other correctional officers, subjected to conditions of confinement that violate the Eighth Amendment, and to his receiving inadequate medical care. In his complaint filed in CIV-S-04-0871 MCE EFB, plaintiff presents claims similar to those presented in this action although the complaints for each action

1 and allegations therein are not identical. Defendant argues that this action should either be
2 dismissed as duplicative of CIV-S-04-0871 MCE EFB or stayed until that case is concluded.
3 Defendant's motion for summary judgment is pending in CIV-S-04-0871 MCE EFB. No such
4 motion has yet been filed in this case.

5 In an effort to best utilize judicial resources, in order to avoid contrary resolutions
6 in this action and CIV-S-04-0871 MCE EFB and because CIV-S-04-0871 MCE EFB is closer to
7 conclusion than this action, the court will recommend that this action be stayed until final
8 judgment is entered in CIV-S-04-0871 MCE EFB. See Adams v. California Dept. Of Health
9 Services, 487 F.3d 684, 688 (9th Cir. 2007) (court has discretion to stay duplicative action). A
10 stay is more appropriate than dismissal because it is not entirely clear that all the claims
11 presented in this action are presented in CIV-S-04-0871 MCE EFB. If defendant is granted
12 summary judgment in CIV-S-04-0871 MCE EFB, it appears likely that at least some of
13 plaintiff's claims against defendant in this action will be barred under the doctrines of res
14 judicata or collateral estoppel, but he still may be allowed to proceed with other claims.

15 Accordingly, IT IS HEREBY RECOMMENDED that:

- 16 1. Defendant Sloss's April 16, 2007 motion to dismiss be denied.
- 17 2. Defendant Sloss's motion that this action be stayed pending the outcome of
18 CIV-S-04-0871 MCE EFB be granted.
- 19 3. This action be stayed.
- 20 4. The parties be directed to inform the court within ten days of the entry of final
21 judgment in CIV-S-04-0871 MCE EFB.
- 22 5. The Clerk of the Court be directed to administratively close this case.

23 These findings and recommendations are submitted to the United States District
24 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
25 days after being served with these findings and recommendations, any party may file written
26 objections with the court and serve a copy on all parties. Such a document should be captioned

1 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
2 shall be served and filed within ten days after service of the objections. The parties are advised
3 that failure to file objections within the specified time may waive the right to appeal the District
4 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

5 DATED: January 18, 2008.

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9 U.S. MAGISTRATE JUDGE

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